IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 11-10-2007

CORAM

THE HONOURABLE MR.JUSTICE S.PALANIVELU

CRIMINAL REVISION CASE Nos.575 & 581 OF 2007

M/s.Nachi Exports,
rep.by its Proprietor
V.E.Periannan ... Petitioner in both cases

-vs-

1.M/s.T.K.Thiruvengadam & Sons
2.T.Selvam ... Respondents in both cases

Revisions under Sections 397 and 401 of the Code of Criminal Procedure.

For petitioner : Mr.G.Anand

COMMON JUDGMENT

These revisions have been filed against the orders, dated 27.02.2007, passed in M.P.Nos.653 and 654 of 2007 in C.C.No.4851 of 1996 on the file of XVIII Metropolitan Magistrate, Saidapet, Chennai, whereby the requests of the petitioner to declare second respondent as a 'proclaimed offender' and to attach his properties, were rejected.

2. Briefly stating, the facts are as under :

2.1. Petitioner is a proprietary concern, engaged in export of cashew kernels. Respondent No.1 is a partnership firm and respondent No.2 is the Managing Partner, who agreed with the petitioner to arrange cashew kernels for export, but he did not do so, after accepting the cheque, which later got bounced. In the first respondent firm, there were three partners, by name, T.Selvam, T.Muthukrishnan and T.Vijayarangan, who are siblings of second respondent.

2.2. Petitioner preferred a private complaint in C.C.No.4851 of 1996 on the file of XVIII Metropolitan Magistrate Court, Saidapet, Chennai, against the respondents and the respondents were found guilty of the offence punishable under Section 138 of the Negotiable Instruments Act; whereby first accused was sentenced to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for three months and second

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accused to undergo simple imprisonment for one year. It was further directed to pay a compensation of Rs.11.00 lakhs to the de facto complainant. Against the said conviction, Criminal Appeal No.262 of 2003 was preferred by the respondents on the file of III Additional Sessions Court, Chennai, and the said Court confirmed the conviction and sentence on 29.01.2004.

2.3. Respondents carried the judgment of the appellate Court in revision before this Court in Criminal R.C.No.853 of 2004 and this Court, on 14.03.2006, dismissed the revision, confirming the judgment of the appellate Court.

2.4. Subsequently, the petitioner had taken steps to get the NBWs executed against the respondents/accused through police, but the NBW against second accused could not be executed by the police, even though on two occasions, the XVIII Metropolitan Magistrate, Chennai, issued the same. It is stated by the petitioner that the police were unable to execute the warrant, since the accused was not available either in his residence or office.

2.5. The sureties action was also taken by the said Court, but, on summoning them, they pleaded their inability to locate second accused.

2.6. Facing the failure to execute the NBW against second accused, the petitioner filed two petitions before the XVIII Metropolitan Magistrate Court, Saidapet, Chennai, in M.P.Nos.653 and 654 of 2007 under Sections 82 and 83 Cr.P.C., for the relief stated supra.

2.7. Both the petitions suffered dismissal at the hands of the said Magistrate. In the order passed in petition under Section 82 Cr.P.C., the Magistrate observed that on a perusal of the records, the Court found that the report submitted by the Inspector of Police was not sufficient to declare the accused as a 'proclaimed offender'. Inasmuch as the petition under Section 83 is concerned, the observation of the Magistrate goes to the effect that since the accused was never declared as a proclaimed offender, the de facto complainant cannot seek attachment of the properties of the accused and that he may seek remedy before the District Collector, as per the provisions contemplated under the Revenue Recovery Act.

2.8. Aggrieved over the said orders, the petitioner is now before this Court, with these revisions.

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3. In this context, it is profitable to mention Section 82 Cr.P.C., which reads as follows :

> "82.Proclamation for person absconding.- (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is

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concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows :-

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides ;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village ;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house ;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under Sections 302,304,364,367,382,392,393,394,395,396,397,398,399,400,402,436,449,459 or 460 of the Indian Penal Code, and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1)"

4. The Criminal Procedure Code, by means of various provisions, provided ample powers to the authorities concerned to execute a warrant. If an NBW remains unexecuted, the Code comes to the rescue of the

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aggrieved person with two remedies, one for issuing proclamation under Section 82 and the second, attachment or sale of property under Section 83.

5. The sine qua non for initiation of action under Section 82 Cr.P.C. is prior issuance of warrant of arrest by the Court and there must be a report before the Magistrate concerned, that the person against whom the warrant was issued by him had absconded or had been concealing himself so that the warrant could be issued, the essential requirement of which is discernible from the phraseology "reason to believe", which suggests that the Metropolitan Magistrate must be subjectively satisfied that the person has absconded or has concealed himself on the materials before him. If the Magistrate got satisfied with the report of the authority, who is burdened with the duty of executing the NBW, then, he may proceed to initiate action under this provision. For the said purpose, the Magistrate should be satisfied that the accused was well aware of the NBW of arrest, issued against him, and also regarding the efforts taken by the officer concerned for its execution, and that obviously the accused was evading arrest, by adopting foul play or tactful means. Once the Magistrate is satisfied with the above circumstances, there could be no legal obstacle for him to invoke the procedure under Section 82.

6. The word "absconded" is not to be understood as implying necessarily that a person leaves the place in which he resides. Its etymological and its ordinary sense is to hide oneself; and it matters not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply only to the commencement of the concealment.

7. The Magistrate should have materials before him to infer that the accused is wantonly avoiding arrest, knowing full well that the warrant is executable against him. It is the duty cast on the Magistrate to record his satisfaction also, while dealing with under Section 82, as to the knowledge on the part of the accused and his evasive attitude. However, mere issuance of a notice or summons will not fulfil the requirements of this Section.

8. On the backdrop of the above said aspects, the circumstances in this case have to be considered. Firstly, the NBW, issued twice by the Magistrate, failed to bring the desired result and it appears that the Inspector of Police concerned also submitted a report to the Magistrate, but the Magistrate was not satisfied with the report and, hence, dismissed the petitions. The Magistrate should have considered the report, in the light of the provision, namely, Section 82. When the Inspector of Police is coming forward with his inability to execute the warrant, finding no other way for its further action, the Court should have acted under Section 82. The order passed by the Magistrate is silent about the statement mentioned by the Inspector of Police. Any way, the police officer had expressed his inability to execute the NBW. Be that as it may, the circumstances before the Court may also be taken into consideration, to perceive the intention of second accused in the matter.

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9. Counsel on record for the petitioner had taken notice to second accused in these revisions, but, they have been returned, with an endorsement 'left'.

10. At the time of admission, this Court passed an order on 20.07.2007, recording the above said return of the notice with endorsement 'left' and observed that a perusal of the materials available on record discloses that the second accused all along contested the matter and even appeared before this Court through a counsel at the time of final hearing of the revision petitions and, therefore, this Court was constrained to direct the Inspector of Police concerned viz., Inspector of Police, Panruti, to find out the whereabouts of second respondent and, thereafter, serve the notice.

11. After the above said direction by this Court, it is learnt that the Inspector of Police, Panruti, took frantic efforts to serve the notice on second accused, but in vain. So, he filed an affidavit to that effect before this Court along with the certificates of Village Administrative Officers and the statements of Head Constable, who were deputed for the said purpose. The Village Administrative Officer of Panruti Town and the Village Administrative Officer of Laxminarayanapuram, Panruti Taluk, have given certificates to the effect that second accused is not residing in the address, available in the records. The Head Constable has stated that he inquired the brother of second respondent, but he told that he did not know his whereabouts. On 09.07.2007, the Sub-Inspector of Police (Law & Order) requested the Superintendent of Post Offices, Cuddalore Division, to furnish the address of second accused, who was previously working as a Personal Assistant in the said Department. Pursuant to the said request, the Superintendent of Post Offices, in his reply, gave the address of second accused. The Village Administrative Officer of Laxminarayanapuram has stated in his certificate that in the address furnished by the Superintendent of Post Offices, the second accused was not residing.

12. Producing the above said certificates and statements, the Inspector of Police, Panruti, affirmed in his affidavit that besides the above said attempts, he contacted one of the brothers of second accused, by name, Murugesan, who stated that second accused had left his family long back and he lost contact with him since then and that in spite of repeated and necessary efforts, he could not find out second accused, to serve notice, as per the direction of this Court.

13. The above said statements are self-explanatory, to show that second accused has been wilfully avoiding the process of the Court and is evasive of NBW. At this juncture, the Court is left with no other option except to adopt the procedure contemplated under Section 82 Cr.P.C. There are sufficient materials for reaching a conclusion that second accused is having knowledge of the Court proceedings, including issuance of NBW by the Court, on more than one occasion. It is also to be seen that he had

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been effectively participating in the proceedings before the appellate Court and this Court.

14. In view of the factors mentioned above, this Court directs the XVIII Metropolitan Magistrate, Saidapet, Chennai, to adopt the procedure, adumbrated under Section 82 Cr.P.C. and, after exhausting the avenues, pass necessary orders, in accordance with law.

15. In so far as the relief under Section 83 Cr.P.C. is concerned, the attachment of movable and immovable properties or both belonging to the proclaimed person will arise only after issuance of proclamation and, hence, presently, the petition under Section 83 is not maintainable. The petitioner is at liberty to renew his petition under Section 83 at a later point of time, if the circumstances so warrant.

16. With the above direction and observations, these revisions are disposed of.

dixit

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1. The XVIII Metropolitan Magistrate, Saidapet.

2. The Inspector of Police,
   Panruti.

3. The Public Prosecutor, High Court, Madras.

4. The Chief Metropolitan Magistrate,
   Egmore, Chennai.

VRK(CO)
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